Supreme Court, U.S.
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No. 82-969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AERONAUTICAL MACHINISTS LODGE 709,
IAM & AW, AFL-CIO,
Petitioner,

v.

LOCKHEED-GEORGIA COMPANY,
division of LOCKHEED CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether a labor arbitrator, as an aspect of the "common law of the shop," may recognize that a union representative has an implicit duty to refrain from physical violence in dealing with management representatives, and whether a breach of that duty permits an employer to deny plant access to the individual in question.

2. Whether a labor arbitration award denying plant access to a union representative who assaulted management representatives is based on the collective bargaining agreement and the "common law of the shop," and therefore should be enforced by the courts.

3. Whether a court, after setting aside a labor arbitration award, must interpret the collective bargaining agreement and issue its own remedy instead of leaving to arbitration any remaining dispute under the agreement.

4. Whether an award of attorney's fees may be made against a party that refuses to abide by a labor arbitration award "without justification."

LIST OF PARTIES

Lockheed-Georgia Company (hereinafter "Lockheed" or the "Company") agrees with the list of parties submitted by Aeronautical Machinists Lodge 709, IAM & AW, AFL-CIO (hereinafter the "Union").

Pursuant to Rule 28.1 of the United States Supreme Court Rules, Lockheed also submits the following list of all parent, subsidiary and affiliate corporations:

Lockheed Air Terminal, Inc.
Lockheed Air Terminal, S.A.
Lockheed Aircraft (Asia) Limited
Lockheed Aircraft (Australia) Pty. Limited
Lockheed Aircraft Corporation of Canada Limited
Lockheed Aircraft Deutschland Gmbh
Lockheed Aircraft International, A.G.
Lockheed Aircraft International, Inc.
Lockheed Aircraft Service Singapore Private Limited
Lockheed Corporation International, S.A.
Lockheed Electronics Company, Inc.
Lockheed Engineering and Management Services Company, Inc.
Lockheed Finance Corporation
LFC Credit Corporation
Lockheed Georgia International Services, Inc.
Lockheed Missiles & Space Company, Inc.
Lockheed Properties, Inc.
Lockheed Shipbuilding and Construction Company
Lockheed Support Systems, Inc.
Lockheed Systems and Services Company, Inc.
Lockheed Systems S.A.
Lockheed Technical Services Company, Inc.
Lockheed Technology S.A.
Lockheed Western Export Company
Murdock Machine and Engineering Company of Texas
Tristar Parts, Ltd.

Arizona Fueling Facilities Corporation
CTL Corporation
Honolulu Fueling Facilities Corporation
Lockheed-Salt Electronics S.A.
Ocean Minerals, Inc.
Portland Fueling Facilities Corporation
Transnational Housing Company
Lockheed Leadership Fund
Lockheed Aircraft Service—International
Lockheed S.A. de C.V.
Lockheed Systems Company, Inc.
Airarms Incorporated
Colby Crane & Manufacturing, Inc.
Lockheed Aircraft International, S.A.
Lockheed Aircraft Service Company, Inc.
Lockheed Electronics International Operations, Inc.
Lockheed Overseas Capital N.V.
Panel Lock Homes (PHIL) Inc.
Puget Sound Bridge & Dry Dock Company, Inc.
Solar Research Management Corporation
Vega Aircraft Company
Aeronautica Macchi, S.P.A.
Aviaco Traders Limited
Aviquipo, Inc.
Lockheed Aircraft Nederland B.V.
Lockheed Asian Export Company
Lockheed Petroleum Services, Inc.
Lockheed Petroleum Services, Ltd.
Lockheed Equipamentos E. Servicos Ltda.
Lockheed Petroleum Services (U.K.) Limited

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondent Lockheed-Georgia Company (hereinafter "Lockheed" or the "Company") respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Aeronautical Machinists Lodge 709, IAM & AW, AFL-CIO (hereinafter the "Union"), and requests that the Petition be denied for the reasons stated hereafter.

STATUTORY PROVISIONS INVOLVED

Lockheed agrees with the Union that this case involves Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185, but denies that this case involves Rule 52(a) of the Federal Rules of Civil Procedure. Rule 52(a) relates to the setting aside of findings

of fact by a district court. However, in this case the Eleventh Circuit did not set aside any findings of fact that the District Court had authority to make. Moreover, the Union has not indicated in its Petition how Rule 52(a) bears upon this case.

STATEMENT OF THE CASE

Lockheed believes that the nature of this dispute is not clearly explicated by the Union's Statement of the Case. Therefore, Lockheed respectfully submits its own statement of the case.

I. The Arbitration Award.

This case involves the enforceability of a labor arbitration award. The award in question holds that Lockheed was entitled to bar from its premises a Union business representative, Mr. R. P. Mason, who had engaged in a persistent course of extraordinary misconduct, including physical assaults upon management personnel. (App. A).[1] That award was issued pursuant to a collective bargaining agreement (the "Agreement") between Lockheed and the Union, which provided that disputes concerning the interpretation or application of the Agreement should be resolved by arbitration. The arbitration provision of the Agreement, Part B, Article III, Section 5, states that the arbitrator's decision "will be final and binding upon the Company, the Union, and the employee, and shall be complied with expeditiously." (App. Q, p. 5q).

The circumstances leading to the Company's decision to bar Mr. Mason from its premises are summarized in the Arbitrator's Award. (App. B, pp. 2b, 4b). On a number of occasions, the Company notified the Union that Mr. Mason had physically or verbally abused management personnel during the course of his Union activities. (App. B, pp. 3b, 8b). However, the Company was un-

[1] "App." followed by a letter will refer to the designated section of the Appendix filed by the Union with its Petition.

successful in obtaining the Union's cooperation in restraining Mr. Mason from engaging in further violent outbursts against Company personnel. (App. B, pp. 3b, 8b). Mr. Mason's abusive conduct continued, and after Mr. Mason kicked Division Manager Webb Wright on March 29, 1976, the Company warned the Union that further misconduct by Mr. Mason would force the Company to bar him from its premises. (App. B, p. 3b.) Despite this warning, on April 29, 1977, Mr. Mason attacked Production Supervisor Jim Chesser, striking him in the stomach during a discussion in the office of another Lockheed supervisor. (App. B, pp. 2b, 7b).

As a result of Mr. Mason's assault against Mr. Chesser and his long history of similar misconduct toward other Company personnel, the Company decided to permanently bar Mr. Mason from its premises in order to protect its employees from further abuse. In response, the Union presented the Company with a written grievance alleging that Lockheed's action barring Mr. Mason from the plant was in violation of Article II, Section 2 of the Agreement. (App. Q, p. 1q). That provision of the Agreement states as follows:

> The President, Vice-President and Business Representatives of the Union shall have access to the Labor Relations Department Office for the purpose of contacting Labor Relations personnel and *shall have access to the Departments of the Company's plant to which they are assigned for the sole purpose of contacting the Union Steward or Committeeman concerning employee complaints or grievances or matters arising out of the application of this Agreement. Such visits shall be made subject to such regulations as may be made from time to time by the Company.* The Company shall not impose regulations which will render ineffective the purposes of this Section.

(App. Q, pp. 1q-2q) (emphasis added). The Union's grievance was referred to arbitration, and a four-day

hearing on the grievance was held before Arbitrator Roger C. Williams. (App. B, p. 1b).

Under the arbitration provision of the Agreement, in the absence of a stipulation between the parties as to the issue for arbitration, the arbitrator "shall determine the issue or issues to be heard, provided that said issue or issues are arbitrable in accordance with this Section." (App. Q, p. 4q). Based on the evidence submitted and the contentions of the parties, Arbitrator Williams decided that the issue was "whether or not the Company violated the Agreement by permanently barring business representative R. P. Mason from all Company-controlled property on May 3, 1977." (App. B, p. 6b).

In addressing this issue in his Award, Arbitrator Williams first resolved the factual disputes and found that Mr. Mason did indeed assault Mr. Chesser in the incident that led to Mr. Mason's debarment, and that Mr. Mason's assault against Mr. Chesser "culminated a *series* of incidents in which [Mr. Mason] committed the serious misconduct of physically abusing management personnel." (App. B, p. 7b) (emphasis added). Arbitrator Williams also found that, after other assaults by Mr. Mason, Lockheed had *repeatedly* warned the Union that continued misconduct would lead to the denial of Mr. Mason's access to Company property. (App. B, p. 8b).

Arbitrator Williams then interpreted the Agreement between Lockheed and the Union and concluded that Lockheed's decision to bar Mr. Mason from Lockheed-controlled premises did not violate that Agreement. Arbitrator Williams noted that a "rule of reasonableness" must be used in interpreting collective bargaining agreements, and concluded that the Union access provision, Article II, Section 2, did not require Lockheed to grant plant access to an individual who engaged in violent misconduct. (App. B, p. 8b). Arbitrator Williams' analysis in this regard was as follows:

> A rule of reasonableness must be used to interpret and apply the provisions of collective bargaining agreements. Article II, Section 2 of the Agreement specifically gives Business Representatives of the Union the right to access to the Labor Relations Department Office and the departments of the plant for specified purposes. Implicit in those provisions is the requirement that Business Representatives conduct themselves in a manner consistent with commonly accepted behavior in their adversary relationship with management personnel. The right to access to Company facilities may properly be denied an individual who commits physical violence toward others, activity which is clearly beyond the limit of acceptable behavior. . . . . *Grievant's physical abuse of management personnel was sufficiently serious misconduct, committed while he was exercising his right to access to the plant, to justify the Company's action in barring him from Company-controlled facilities.* After he and Local Lodge 709 had been warned of the consequences, he engaged in activity not included in the specified purposes for which he had been granted the right to have access to the plant, and *the physical violence which he perpetrated on management personnel went far beyond any activity which could reasonably be expected of or tolerated from a Business Representative engaged in the representation of bargaining unit employees or the aggressive advocacy of employee rights.* Grievant's conduct while in the Company's plant amounted to an abuse of his right to have access to the plant. *The Company's action in permanently barring Grievant from the plant was justified by his misconduct and did not violate the Agreement.*

(App. B, pp. 8b-9b) (emphasis added). Based upon this analysis, Arbitrator Williams denied the Union's grievance and concluded that Lockheed had not violated the Agreement by barring Mr. Mason from its plant. (App. B, p. 9b).

II. The District Court's Decision to Remand the Dispute to Arbitrator Williams.

After Arbitrator Williams issued his Award, the Union initiated this litigation and the parties filed cross-motions for summary judgment. On June 30, 1980, the District Court issued its first Order in this case, granting neither motion for summary judgment, but ordering the parties to resubmit the case to Arbitrator Williams for additional findings. (App. E).

Despite Arbitrator Williams' careful analysis of the interplay between various explicit and implicit obligations under the Agreement, the District Court largely disregarded that analysis and focused its attention on a single provision of the Agreement: that "[t]he Company shall not impose regulations which will render ineffective the purposes of" Article II, Section 2 of the Agreement. Under the District Court's interpretation of the Agreement, the sole question that could be decided by the Arbitrator was whether the Company's action had rendered Article II, Section 2 "ineffective," and the District Court further concluded that the Company's justification for its action was completely irrelevant to the resolution of this question. (App. E, pp. 4e-5e). The District Court therefore held that Arbitrator Williams had somehow gone beyond the issue submitted to him in finding that the Company's action was "justified." (App. E, p. 4e). Ignoring Arbitrator Williams' recognition of a duty of Union representatives to refrain from violence, the District Court stated its own interpretation of the Agreement to be that if Lockheed's action rendered the purposes of Article II, Section 2 ineffective, its action was a violation of that provision *"no matter how justified."* (App. E, p. 4e) (emphasis added).

The District Court then redefined the issue which, under its interpretation of the Agreement, *should* have been decided by the Arbitrator. Although as noted above the

Agreement states that in the absence of a stipulation by the parties the *Arbitrator* shall determine the issue, the District Court decided that the proper issue for arbitration was "whether the Company's action rendered ineffective the purposes of the business representative provision and thereby violated the collective bargaining agreement." (App. E, pp. 4e-5e). In order to obtain a specific finding on this issue, the District Court remanded the case to Arbitrator Williams. (App. E, p. 5e).

Seeking to avoid protracted litigation over the validity of the original Award, Lockheed filed a motion for reconsideration, or in the alternative, for leave to file an immediate appeal. That motion was denied, and the case was resubmitted to Arbitrator Williams. (*See* App. G, p. 3g).

III. Arbitrator Williams' Decision on Remand.

On March 4, 1981, Arbitrator Williams issued a Supplemental Award addressing the issue formulated by the District Court. (App. F). Arbitrator Williams resolved that issue in favor of Lockheed and again ruled that Lockheed had not violated the Agreement. Arbitrator Williams noted that "seemingly unrestricted rights" granted in a collective bargaining agreement may "include implicit restrictions and corresponding obligations which are effectuated only when unusual or unanticipated circumstances arise." (App. F, pp. 2f-3f). Implicit in the Union's right to access, Arbitrator Williams reasoned, is the requirement that Union representatives conduct themselves "in a manner which is consistent with the purposes for which access has been granted." (App. F, p. 3f). Arbitrator Williams then observed that "a business representative who exercises the right to access to the plant is obligated to refrain from engaging in activity which exceeds the limits of acceptable conduct." (App. F, p. 3f).

Applying these principles to the record before him, Arbitrator Williams concluded that Mr. Mason's conduct

was "repugnant to the collective bargaining process" and that he had waived any right of plant access:

> *Mason's conduct while he exercised his right to access to the plant as a Business Representative was repugnant to the collective bargaining process, was an abuse of the right to access to the plant, and constituted a complete failure to fulfill his obligation for proper conduct while acting in an official capacity.* By engaging in such conduct, he breached the implicit obligation for proper conduct, upon which the right to access to the plant is contingent under Article II, Section 2 of the Agreement. *By breaching the obligation for proper conduct while acting in an official capacity, Mason waived and forfeited his corresponding right as a Business Representative to have access to the plant, and waived and forfeited the Union's corresponding right to have Mason granted access to the plant in his official capacity.* On the basis of Mason's forfeiture and waiver of the right to access to the plant, the Company had the authority to rescind the right to access as it applied to Mason, and the Company did not violate Article II, Section 2 of the Agreement by permanently barring Mason from Company controlled premises.

(App. F, p. 4f) (emphasis added).

As a further answer to the issue posed by the District Court, Arbitrator Williams gave two additional independent bases for his decision. First, he found that Lockheed's denial of plant access to Mr. Mason was not a "regulation" which rendered ineffective the purpose of Article II, Section 2, because "regulations" within the meaning of that provision concern only the *manner* in which plant visits are made, rather than the *right of access.* (App. F, pp. 4f-5f). In addition, Arbitrator Williams concluded that the general purpose of Article II, Section 2 was *not* unduly impaired by the denial of plant access to Mr. Mason, because other business representatives of the Union continued to have access to the plant. (App. F, pp. 4f-5f).

In summary, Arbitrator Williams concluded that Lockheed's action barring Mr. Mason from its premises did not render the purposes of Article II, Section 2 ineffective. (App. F, p. 5f). Thus, Arbitrator Williams explicitly resolved the issue posed by the District Court, and again concluded that the Company's action did not violate the Agreement.

IV. The District Court's Decision to Vacate the Arbitration Award.

After the issuance of the Supplemental Award, the matter was returned to the District Court for action on the parties' outstanding motions for summary judgment. Although Arbitrator Williams had carefully addressed and decided the issue framed by the District Court, the District Court rejected the Arbitrator's resolution of that issue. The District Court stated its view that the Arbitrator's contractual analysis was improperly "premised" on the Arbitrator's previous finding that Lockheed's action was "justified." (App. G, p. 4g). The District Court reiterated that under its own interpretation of Article II, Section 2 of the Agreement, the question whether Lockheed had violated the Agreement must be resolved *"without regard to the arguments the Company might put forth to justify its action."* (App. G, p. 5g) (emphasis added). In response to the Company's argument that the duty to refrain from violence was part of the "common law of the shop," the District Court concluded that the Arbitrator could *not* consider the "common law of the shop" in this case because there was no ambiguity in the Agreement. Thus, having concluded that the Arbitrator had exceeded his authority by employing incorrect contractual analysis, the District Court vacated Arbitrator Williams' Award.

The Union then filed a motion seeking an order requiring Lockheed to grant plant access to Mr. Mason, arguing that the District Court's order vacating the Award was

a decision on the merits of the grievance. The District Court denied this motion based on its conclusion that it lacked authority to grant the requested relief. (App. H).

V. The Eleventh Circuit's Decision Reversing and Remanding the Case for Further Proceedings.

The Company appealed from the District Court's Order vacating the Arbitrator's Award, and on July 21, 1982 the Eleventh Circuit reversed the District Court's decision. (App. A). One might infer that the Eleventh Circuit found this case to contain no novel, difficult or previously undecided issues, because it placed the case on its non-argument calendar and decided the case in an unpublished, *per curiam* opinion. (App. A, p. 1; *See* Rule 23, Interim Rules of the United States Court of Appeals for the Eleventh Circuit; Internal Operating Procedures of the United States Court of Appeals for the Eleventh Circuit, p. 15).

In reversing the District Court, the Eleventh Circuit stated as follows:

> A reading of the arbitrator's original award reveals that it was based on an interpretation of the collective bargaining agreement together with the law of the shop. His analysis and reasoning with regard to the implicit obligation of a business representative to conduct himself in a manner consistent with commonly accepted behavior cannot be said to be without foundation in reason or fact. . . . The arbitrator's original award drew its essence from the collective bargaining agreement and the arbitrator in reading the agreement did not exceed his authority by applying the law of the shop.

(App. A, p. 8a).

Because the Eleventh Circuit found that the original Arbitration Award was valid and should have been enforced, it found that the District Court also erred in remanding the case to the Arbitrator for clarification of

that unambiguous award. (App. A, p. 10a). The Eleventh Circuit further found that in any event the District Court erred in vacating the Arbitrator's Supplemental Award. The Eleventh Circuit found that the Arbitrator's reasoning in his Supplemental Award was "rationally based on the collective bargaining agreement and the law of the shop." (App. A, pp. 10a-11a). Because the Eleventh Circuit found that both the Arbitrator's original Award and Supplemental Award were valid and enforceable, that Court also rejected the Union's request for an injunction requiring Lockheed to grant Mr. Mason access to its property. (App. A, p. 11a).

Finally, the Eleventh Circuit observed that a court has authority to award attorney's fees in a Section 301 action where it determines that a party has refused to abide by an arbitration award "without justification." (App. A, p. 11a). The Eleventh Circuit therefore remanded the case to the District Court for a determination as to whether the Union should be required to compensate the Company for its attorney's fees in this case.

SUMMARY OF ARGUMENT

Nothing in this case requires review by the Supreme Court, because the decision of the Eleventh Circuit in this case was entirely consistent with this Court's decisions regarding judicial review of labor arbitration awards. Indeed, the legal principles involved in this case were set forth by this Court in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960), and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (the "*Steelworkers Trilogy*"), and nothing in this case requires either a reconsideration or even a novel application of those principles.

Under this Court's decisions, an arbitration award can only be set aside if it "fails to draw its essence" from the

applicable collective bargaining agreement and the "common law of the shop." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). In determining whether the award has satisfied this requirement, a court is not to engage in its own contractual interpretation and cannot set the arbitrator's award aside merely because a court would have rendered a different interpretation than the arbitrator. *Id.*

The Eleventh Circuit vindicated these principles by reversing the District Court and enforcing the Arbitration Award. The Eleventh Circuit found that the Award *did* draw its essence from the Agreement and the common law of the shop. Further, the Eleventh Circuit found that the District Court, in setting aside the Award, had merely engaged in its own interpretation of the Agreement and had substituted its judgment for the judgment of the Arbitrator. Thus, in reversing the District Court, the Eleventh Circuit explicitly applied this Court's rulings regarding the proper scope of judicial review of labor arbitration awards.

The decisions below are also completely consistent with the decisions of this Court insofar as the courts below have refused to rule on the merits of the underlying grievance, and have denied the Union's request for an injunctive order requiring Lockheed to grant plant access to Mr. Mason. As an initial matter, the Award of the Arbitrator denying plant access to Mr. Mason was valid, and therefore the Union was bound by the Award and was not entitled to the relief it requested. Moreover, assuming *arguendo* that the Award was invalid, this Court has held that where the parties to a collective bargaining agreement have provided for arbitration of a dispute, the courts have no authority to decide the merits of such a dispute. Instead, the parties must submit the dispute to arbitration. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567-68

(1960). Therefore, even if the Award in this case were properly set aside, the remedy would not be for the District Court to impose its own interpretation of the Agreement, but would be for the aggrieved party to resubmit the matter to arbitration in accordance with the Agreement.

The Union has also sought a writ of certiorari for this case on the ground that this case presents issues already before the Court in *W.R. Grace & Co. v. Rubber Workers Union Local 759*, 652 F.2d 1248 (5th Cir., Unit A, 1981, certiorari granted, No. 81-1314, June 28, 1982). However, the issues presented in *W.R. Grace* are not involved in this case, and this Court's decision in *W.R. Grace* will have no impact on the correctness of the Eleventh Circuit's decision in this case. *W.R. Grace* involves the questions whether an arbitrator is bound by the previous findings of a court, and whether an arbitrator's award may be set aside where his award does not even refer to the contract and does not purport to draw its essence from the contract. In the instant case, there were no prior judicial findings that were contrary to the Arbitrator's Award, and the Arbitrator did expressly interpret the Agreement as a basis for his Award. Therefore, this Court's ruling in *W.R. Grace* will be inapposite to the issues presented by the instant case.

Finally, the Union has argued that the Eleventh Circuit's decision is in conflict with this Court's decision in *Summit Valley Industries v. Carpenters Local Union 112*, 102 S. Ct. 2112 (1982), insofar as the Eleventh Circuit directed the District Court to reconsider Lockheed's request for attorney's fees. However, *Summit Valley* does not apply to Section 301 actions such as this action. In any event, there has been no final determination of the attorney's fees issue in this case by any lower court, so that that issue is simply not ripe for review by this Court.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION TO ENFORCE THE ARBITRATION AWARD IS CONSISTENT WITH DECISIONS OF THIS COURT AND DECISIONS OF OTHER CIRCUIT COURTS.

As its first reason for requesting the issuance of a writ of certiorari, the Union asserts that the Eleventh Circuit's decision in this case conflicts with decisions of the Supreme Court and with precedent in other circuit courts of appeals. In this regard, the Union suggests that the Eleventh Circuit's decision upholds an arbitration award that is in violation of plain contractual provisions and that fails to draw its essence from the Agreement.

The Union has attempted to characterize the issue in this fashion in order to persuade the Court to review this case. However, it is apparent that the Union's Petition is merely part of the Union's ongoing effort to have the judiciary reinterpret the Agreement and rule in the Union's favor on the underlying grievance. The Eleventh Circuit correctly rejected this effort by the Union and, relying on the guidelines established over twenty years ago in the Supreme Court's *Steelworkers Trilogy*, ruled that the award in dispute was enforceable because it did draw its essence from the Agreement.

The Eleventh Circuit found its chief source of guidance in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) and *United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593 (1960). In those cases, the Supreme Court announced three fundamental principles which are the foundation of the Eleventh Circuit's decision in this case: (1) the merits of an arbitration award are not subject to judicial review; (2) a court must not set aside an arbitration award simply because the court would have interpreted the collective bargaining agreement differently than the arbitrator did; and (3) a court must not

set aside an arbitration award unless the award fails to draw its essence from the collective bargaining agreement and from the "common law of the shop."

It appears that all parties to this litigation *agree* with these basic principles. Thus, there are no substantial legal issues raised by the decision below. Instead, the issues raised by the Union concern merely the question whether the relevant principles were correctly *applied* by the Eleventh Circuit. Furthermore, the Union's argument that the Eleventh Circuit's decision is in *conflict* with the principles announced in *Warrior & Gulf Navigation* and *Enterprise Wheel & Car Corp.* is based on nothing more than the Union's continuing disagreement with the Arbitrator's interpretation of the Agreement. Stated simply, the Union's argument is that the Arbitrator reached the *wrong* interpretation of the Agreement and that the Award therefore failed to draw its "essence" from the Agreement. This is a bootstrap argument in which the Court must substitute its interpretation of the Agreement for that of the Arbitrator before the Court could even decide whether to enforce the Award. As will be seen below, this analysis proposed by the Union is contrary to principles established by this Court.

A. The Arbitrator Did Not Exceed His Authority by Recognizing an Implicit Duty of Union Representatives to Refrain from Physical Violence.

The Union's principal argument concerns the Arbitrator's finding that the Union's right of plant access included the corresponding implicit duty of Union representatives to refrain from violence. While Lockheed submits that this obligation is a self-evident part of any collective bargaining relationship, the Union reasons that the Award does not draw its essence from the Agreement because it depends on the Arbitrator's application of this "implicit" obligation. According to the Union, recognition of this obligation is contrary to the "plain" terms of the Agreement regarding plant access.

The Eleventh Circuit properly rejected this argument. First, the Union is simply wrong in asserting that there are "plain" contractual terms that were violated by the Award. As the Arbitrator explained in the Supplemental Award, the Arbitrator did nothing more than to recognize that the contractual right of plant access was for a specific, *limited* purpose, and was *not* intended to permit physical violence by Union representatives in the Lockheed plant. By engaging in violence and exceeding the limited purposes for which plant access was granted, Mr. Mason waived his right of access. The Award and Supplemental Award are thus consistent with a perfectly straightforward reading of the Agreement.

Nor is any difficulty presented by the fact that the duty to refrain from violence is an implicit part of the collective bargaining relationship. The principle that a labor arbitrator is *expected* to apply implicit terms of a contract was made clear by the Supreme Court's decision in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). In that case, the Supreme Court noted that collective bargaining agreements are typically vague as to many terms, because the parties are *compelled* by circumstances to reach some agreement and are likely to leave some problems to future resolution. The arbitrator fills a vital role in "solving the unforseeable by molding a system of private law for all the problems which may arise . . . in a way which will generally accord with the variant needs and desires of the parties." *Id.* at 580-81. Thus, this Court recognized that labor arbitrators must be allowed to rely on the many implicit obligations which, over time, have become a part of either the "common law of the shop" or the practices of the contracting parties:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . .

> *The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.* The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. *The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished.* For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

363 U.S. at 581-82 (emphasis added).

In the instant case, there was no contractual provision dealing specifically with the problem of physical violence by Union representatives. Thus, faced with the extraordinary problem of a Union business representative who physically attacked management representatives, Arbitrator Williams relied upon the implicit but universally-recognized principle that physical violence has no place in labor-management relations.

In finding a waiver of the right of plant access, it is clear that Arbitrator Williams was not precluded from recognizing the inherent obligation of labor representatives to refrain from violence. Arbitrator Williams' application of this implicit duty was well-founded, for it is widely recognized that an employer has no obligation to

tolerate physical violence in its plant, even when that violence is perpetrated by union representatives. Arbitrators, federal courts, and the National Labor Relations Board have all so held.[2]

In the instant case, the Eleventh Circuit properly pointed out that the obligation to refrain from physical violence was a part of the "common law of the shop." Relying on this Court's decision in *Warrior & Gulf Navigation Co.*, the Eleventh Circuit ruled that the Arbitrator was well within his authority in considering this "common law of the shop" in issuing his Award. (App. A, p. 8a).

The Union argues that it was improper to apply such implicit obligations in this case because the Agreement granted Mr. Mason access to Company property in what the Union contends are plain and absolute terms.[3] How-

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[2] *See, e.g., Fitzsimons Manufacturing Co.*, 251 NLRB 375 (1980) (A single incident of misconduct by a union representative had so "weakened the fabric of the bargaining relationship and engendered such ill will as to legally entitle Respondent to refuse to meet with" the responsible individual.); *N.L.R.B. v. Sun Co. of San Bernardino, California*, 215 F.2d 379, 382 (9th Cir. 1954) ("There must be some area in labor relations where an employer has the right to clear up a situation which not only threatens the orderly functioning of its business but could erupt into physical violence."); *Associated Hospitals of San Francisco*, 62 Lab. Arb. & Disp. Settl. 323, 327 (Koven, 1976); *Associated Hospitals of the East Bay, Inc.*, 47 Lab. Arb. & Disp. Settl. 858, 861 (Koven, 1966); *Kimberly-Clark Corp.*, 63 Lab. Arb. & Disp. Settl. 37 (Simon, 1974); *Arrow Trailers, Inc.*, 62 Lab. Arb. & Disp. Settl. 387, 388 (Caraway, 1974).

[3] The Union also argues that the Arbitrator was required to apply only express terms of the Agreement, because the arbitration provision states that "The arbitrator shall not have authority to amend or modify this Agreement or establish new terms and conditions of this Agreement." (App. Q, p. 5q). However, this contractual provision is a typical clause which confirms the fact that the arbitrator's decision must draw its "essence" from the collective bargaining agreement, but which should not be construed as a limitation on the arbitrator's broad authority to *interpret* the obligations

ever, in light of the universal recognition that violence cannot be tolerated in an industrial plant, it is far from "clear" that the parties' specific intent was to grant an absolute right of access to an individual who presented a demonstrated risk of physical harm to the employees within the plant. Rather, it is perfectly reasonable to conclude that in negotiating a provision for Union access to the plant, the parties did *not* intend that that provision could be abused by an individual whose attacks on Lockheed personnel have been found to be "repugnant to the collective bargaining process." (App. F, p. 4f). This was the interpretation chosen by the Arbitrator. Further, this interpretation does not *conflict* with the plant access provision of the Agreement, but is a perfectly rational *interpretation* of that provision, in light of the universally recognized obligation to refrain from physical violence. The Eleventh Circuit thus properly ruled that this interpretation was valid and was not subject to being set aside by the courts.

B. The Eleventh Circuit Correctly Ruled that the District Court Could Not Substitute its Interpretation of the Agreement for the Interpretation of the Arbitrator.

Throughout this litigation, the Union has argued that the Arbitrator deviated from the "plain" meaning of the Agreement in concluding that Lockheed could bar a Union representative from its plant because of that individual's physical violence. In essence, the Union's argument is thus that the Arbitrator rendered an incorrect interpretation of the Agreement.

While the Union originally was successful in convincing the District Court that the Arbitrator had rendered an improper interpretation of the Agreement, the Eleventh

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of the parties in light of all relevant considerations. *See, e.g., Boise Cascade Corp. v. United Steelworkers of America, Local No. 7001*, 588 F.2d 127, 129-30 (5th Cir.), *cert. denied*, 444 U.S. 830 (1979); R. Gorman, *Basic Text on Labor Law* 589 (1976).

Circuit correctly observed that the Arbitrator's interpretation was not subject to judicial review. The Eleventh Circuit's decision in this regard was in accordance with the decisions of this Court. This Court has imposed strict limitations upon judicial review of labor arbitration awards, because of the arbitrator's special competence in labor matters, and because of the federal policy favoring resolution of labor disputes by arbitration. The Court also has emphasized that it is not the function of the courts to re-examine a labor arbitrator's factual determinations, or to reconsider the arbitrator's interpretation of the collective bargaining agreement between the parties. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-99 (1960). In reviewing a labor arbitrator's award, a court must not set the award aside unless the award fails to "draw its essence" from the collective bargaining agreement and the common law of the shop. *Id.* at 597. This Court has also stressed that the reviewing court must *not* attempt to engage in its own interpretation of the collective bargaining agreement, and *must not attempt to examine the correctness of the arbitrator's interpretation in light of legal principles. Id.* at 598-99. The Court has observed that when parties agree to submit labor disputes to arbitration, it is the *arbitrator's* interpretation of the agreement for which they bargain, and *"the courts have no business overruling him because their interpretation of the contract is different from his." Id.* at 599 (emphasis added).

The Eleventh Circuit was forced to reverse the judgment of the District Court because the District Court violated these well-settled principles and engaged in a complete reinterpretation of the Agreement. For example, among other errors, (1) the District Court redefined the issue for arbitration, contrary to the contractual mandate that the *arbitrator* would define the issue (*see* App. A, p. 9a); (2) the District Court created its own analytical framework for interpretation of the Agreement, which was contrary to the contractual analy-

sis used by the Arbitrator (*see* App. A, p. 9a); (3) the District Court ultimately set the Award aside because the District Court's interpretation of the Agreement was different from the Arbitrator's interpretation (*see* App. A, pp. 10a-11a); and (4) the District Court, in order to reach its conclusions, engaged in a complete re-examination of the record from the arbitration proceedings and made its own findings as to such matters as the past practice of the parties. (*See* App. G, pp. 6g-7g). Indeed, the District Court went so far as to rule that in the absence of an ambiguity in the Agreement, the Arbitrator was precluded from considering or applying the "common law of the shop" in rendering his award. (App. G, p. 6g). These conclusions by the District Court, as well as others discussed in the opinion of the Court of Appeals, were contrary to the express limitations established by this Court regarding judicial review of labor arbitration awards. The Court of Appeals was thus correct in reversing the District Court and directing that the arbitration awards be enforced.

Even if the District Court were correct in remanding the original Award for further findings and in redefining the issue to be decided by the Arbitrator, the Supplemental Award specifically decided the issue set forth by the District Court. In the Supplemental Award, Arbitrator William's explicitly ruled that the general purpose of Article II, Section 2 of the Agreement was not "rendered ineffective" by the Company's action, because "all other Business Representatives continued to have access to the plant." (App. F, p. 4f). Arbitrator Williams further concluded that "the bar to Mason's entry was not a regulation of plant visits which rendered the purpose of Article II, Section 2 ineffective, and the Company did not violate Article II, Section 2 by imposing the bar." (App. F, pp. 4f-5f). The Arbitrator thus answered the specific question framed by the District Court and concluded for the second time that the Company's action *did not violate the Agreement.*

In rejecting the Arbitrator's decision, the District Court reasoned that the Arbitrator's contractual analysis was erroneous. Indeed, the District Court went so far as to rule on which arguments of the parties could be considered in interpreting the Agreement. (*See* App. G, pp. 4g-5g). The District Court's reasoning thus directly contravenes this Court's rulings precluding judicial review of arbitration awards.

As noted above, the Supreme Court has ruled that matters of contract interpretation are exclusively within the domain of the arbitrator, and that courts must not examine the correctness of an arbitrator's decision in light of legal principles. *Enterprise Wheel & Car Corp., supra,* 363 U.S. at 598, 599. The Eleventh Circuit's decision in this case carries out that mandate, by ruling that the Arbitrator's conclusion was final and binding on the parties. Therefore, the Union's request for a writ of certiorari with respect to the enforceability of the Award should be denied.

II. THE LOWER COURTS' DENIAL OF INJUNCTIVE RELIEF TO THE UNION WAS CONSISTENT WITH THE DECISIONS OF THIS COURT.

As a second reason for requesting the issuance of a writ of certiorari, the Union asserts that it was entitled to a resolution of the merits of the dispute underlying the grievance. The Union seeks a judicial determination that Lockheed violated the Agreement in barring Mr. Mason from its premises as well as an order that Lockheed must grant Mr. Mason access to its property. This request is once again fundamentally at odds with this Court's rulings that the judiciary must not become involved in the merits of arbitrable disputes.

Of course, assuming *arguendo* that a court would have the authority to grant the requested relief, the Union would not be entitled to such relief unless it could show first that the Award deciding the dispute should be set aside. The Eleventh Circuit ruled correctly in this regard

that the Union was not entitled to any relief, for the reason that the Arbitration Award was valid and should not have been vacated by the District Court. The Eleventh Circuit therefore did not need to consider whether the District Court would have had authority to grant the relief requested by the Union. Similarly, the fact that the Award was valid and enforceable means that the Supreme Court has no reason to address the hypothetical question of whether the District Court could have granted the injunctive relief requested by the Union.

Nevertheless, assuming *arguendo* that the Award should have been set aside, still the District Court was correct in concluding that it had no authority to decide the underlying dispute, or (in effect) to grant injunctive relief by ordering Lockheed to provide plant access to Mr. Mason. In denying the relief requested by the Union, the District Court observed that "if the court were to order defendant to allow Mr. Mason into its facilities, it would be ruling on the contract dispute contrary to the long established federal policy of submitting labor disputes to binding arbitration." (App. H, p. 2h, *citing United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960)). The District Court also noted the Fifth Circuit's previous ruling that if a court finds that the arbitrator exceeded his authority, it *cannot* then go on to interpret the contract for itself. (App. H, p. 2h, *citing International Association of Machinists and Aerospace Workers, District No. 145 v. Modern Air Transport*, 495 F.2d 1241, 1244-45 (5th Cir. 1974), *cert. denied*, 419 U.S. 1050 (1975)).

In this respect, the District Court was correct. The parties provided in the Agreement that disputes over the interpretation of the Agreement were to be resolved exclusively by arbitration. Under such circumstances, the

courts have no jurisdiction to decide the merits of any grievance arising under the Agreement. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567-68 (1960).

The lower courts' denial of the relief requested by the Union is also consistent with other circuit court authority. In *International Association of Machinists & Aerospace Workers, District No. 145 v. Modern Air Transport, Inc.*, 495 F.2d 1241 (5th Cir. 1974), *cert. denied*, 419 U.S. 1050 (1975), the Fifth Circuit Court of Appeals found that the District Court had erred when it attempted to resolve the merits of a grievance after finding the arbitrator's award invalid. The Fifth Circuit stated:

> When the district court went on to interpret the contract, the court itself *improperly* "[resumed] its traditional goal of assaying the judicial acceptability of the award." The proper course for district court would have been to deny enforcement upon finding that the arbitrator manifested an "infidelity to his obligation."

495 F.2d at 1244-45 (emphasis added). *See also Smith v. Union Carbide Corp.*, 350 F.2d 258 (6th Cir. 1965); *Yates v. Yellow Freight Systems*, 501 F. Supp. 101 (S.D. Ohio 1980).

Although the law is clear that a court cannot decide the merits of a grievance in an action to vacate an arbitration award, the Union has endeavored to muddle the picture by citing a host of inapposite cases and inapplicable principles of law. Not one of the cases cited by the Union holds or even suggests that a court may decide the merits of an arbitrable grievance. Although the Union relies on *Brotherhood of Railroad Trainmen v. Central of Georgia Ry.*, 415 F.2d 403 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970), for the proposition that an award need not be enforced if it fails to draw its essence from the contract, nothing in that decision even remotely suggests

that the court could decide the underlying grievance after vacating the award. Similarly, the Union cites *Locals 2222, 2320-2327, International Brotherhood of Electrical Workers v. New England Telephone & Telegraph Co.*, 628 F.2d 644 (1st Cir. 1980), for the proposition that a party need not process a new *grievance* in order to resubmit a matter to an arbitrator for clarification of his award. Again, nothing in that case suggests that a *court* may decide the merits of a dispute which is subject to arbitration, even if an arbitrator's initial decision of the grievance has been vacated.

The Union additionally argues that the Court has authority to enforce the Agreement under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. This argument overlooks a fundamental principle of federal law under that provision: where the parties have agreed to resolve their contractual disputes through arbitration, that is how such disputes must be resolved. The Court "enforces" the contract by honoring the parties' agreement for resolution of disputes through arbitration. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960). For example, when one party refuses to arbitrate an arbitrable contractual dispute, a court does not decide the dispute for the parties but compels arbitration of the dispute. *See e.g., International Brotherhood of Electrical Workers, Local 2188 v. Western Electric Co.*, 661 F.2d 514 (5th Cir. 1981). And as noted earlier, a court that reviews an arbitration award and finds the award invalid is not authorized to decide the underlying dispute. *Modern Air Transport, supra.*

The Union asserts that "orders to arbitrate have been denied because it is the basic duty of the courts to enforce the provisions of collective bargaining agreements." (Union's Petition, p. 21). However, as is shown by the case cited by the Union, a denial of an order to compel arbitration is appropriate only if the parties have not

agreed to arbitrate the matter in question. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). Such is not the case here. The parties agreed to arbitrate the Union's grievance, and a court can only enforce the Agreement by permitting the parties to resolve the dispute through arbitration.

Trying still another tack, the Union attempts to draw an analogy between this case and cases involving the concurrent jurisdiction of the courts, the National Labor Relations Board, and arbitrators. Such cases arise when labor disputes involve claims both under statutory law and the provisions of a labor contract. (Union's Petition, pp. 22-23). In each of the cases cited by the Union, the court or the Board was not bound by the decision of an arbitrator as to matters of *statutory interpretation*, because such matters were not within the scope of the arbitrator's legal authority. *E.g., Barrentine v. Arkansas Freight System*, 450 U.S. 728 (1981) (action under Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 416 U.S. 36 (1974) (action under Title VII of the Civil Rights Act of 1964). In the instant case, the only question before the Court is whether Arbitrator Williams' decision interpreting and applying the Agreement should be vacated or confirmed. The underlying dispute is solely a matter of contract interpretation, and there is no question of any statutory violation by the Company. Thus, the issue raised by the Union's grievance is one reserved exclusively for arbitration, and the District Court correctly ruled that it could not grant affirmative relief as requested by the Union.

III. THIS CASE AND THE *W.R. GRACE* CASE HAVE NO ISSUE IN COMMON.

As a third reason for requesting a writ of certiorari, the Union has argued that there is some issue in this case that is already before this Court in *W.R. Grace & Co. v. Rubber Workers Union Local 759*, 652 F.2d 1248 (5th Cir., Unit A, 1981 certiorari granted, No. 81-1314,

June 28, 1982). However, an examination of the facts in that case shows that this Court's decision in *W.R. Grace* will have no bearing on this case.

In *W.R. Grace*, the court had compelled the employer to arbitrate certain grievances of laid-off employees after finding that the layoffs breached the collective bargaining agreement. Subsequently, an arbitrator denied the grievances on the ground that the employer had acted in good faith on the basis of its commitments under an EEOC conciliation agreement. The Arbitrator did not even purport to decide that case based on whether the employer's action breached the collective bargaining agreement. The Fifth Circuit found this award to be invalid because it was not based on *any* interpretation of the agreement, and because the award was in conflict with the court's determination prior to arbitration that the employer had breached the agreement.

The first issue presented in the petition for certiorari in *W.R. Grace* is thus whether a federal court, in granting an order to compel arbitration under a labor contract, may decide certain issues relating to the merits of the dispute and thereby withdraw from the arbitrator authority to decide those issues. *See* Petition for Writ of Certiorari in *W.R. Grace & Co. v. Rubber Workers Local 757*, Case No. 81-1314. This issue is not present in the instant case, because the Arbitration Award in the instant case was not inconsistent with any prior judicial order regarding the arbitrable dispute. Any arguable "conflict" between the Award and a judicial order did not occur until *after* the Award, when the District Court improperly rendered its own interpretation of the Agreement. Assuming *arguendo* that the Arbitrator subsequently became bound by the findings of the District Court in the erroneous order remanding the case to the Arbitrator, still the Arbitrator did answer the precise question submitted to him by the District Court and found that the Company had not rendered Article II, Section 2 ineffective and had not violated the Agreement.

Thus, there is no arguable conflict between an arbitrator's award and a prior court decision, as there was in *W.R. Grace.*

The second issue presented in *W.R. Grace* is whether a court may rule an arbitration award invalid because the award does not specifically refer to contract provisions supporting the award. *See* Petition for Writ of Certiorari in *W.R. Grace, supra.* This issue is not presented in this case, because the Award in this case is expressly based on an *interpretation* of specific language in the Agreement. In *W.R. Grace,* on the other hand, the arbitrator did not even purport to be interpreting the applicable agreement, but essentially ruled that the grievances should be denied regardless of whether the collective bargaining agreement was breached.

The third issue presented in *W.R. Grace* is whether an employer may be held liable for back pay to laid-off employees when the employer selected those employees for lay-off pursuant to the mandate of an EEOC conciliation agreement. *See* Petition for Writ of Certiorari in *W.R. Grace & Co., supra.* This issue obviously is not present in this case, because the Company has not maintained that its actions were based on an attempt to comply with any judicial or administrative order.

Because none of the issues raised in the *W.R. Grace* case are raised in the instant case, the Union's petition for writ of certiorari should not be granted on the basis of any relationship between these two cases.

IV. THE STANDARD FOR AWARD OF ATTORNEY'S FEES ANNOUNCED BY THE CIRCUIT COURT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

As a fourth and final reason for the issuance of a writ of certiorari, the Union argues that the Eleventh Circuit's decision was contrary to decisions of this Court, insofar as the Eleventh Circuit ruled that the Union may be liable for attorney's fees if its refusal to comply

with the Award was without justification. Specifically, the Union cites *Summit Valley Industries v. Carpenters Local Union 112*, 102, S. Ct. 2112 (1982), where this Court held that under 29 U.S.C. § 303, attorney's fees can only be awarded in accordance with the "American Rule." Under the American Rule, attorney's fees are awardable only in limited circumstances, such as where a party acts in bad faith or in willful disobedience of a court order.

Summit Valley Industries does not appear to have any bearing on this case. While *Summit Valley Industries* involved an action under 29 U.S.C. § 303, this case involves an action under § 301. This difference is of great importance, because this Court previously has held that unlike most other statutes, § 301 grants the federal courts broad authority to fashion a federal common law with respect to actions for breach of a collective bargaining agreement. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 450-56 (1957); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). In accordance with this statutory mandate, a number of courts of appeals have held that attorney's fees may be awarded against a party that refuses to abide by a labor arbitration award, if that refusal is "without justification." *See e.g., United Steelworkers of America v. United States Gypsum Co.*, 492 F.2d 713, 734 (5th Cir.), *cert. denied*, 419 U.S. 998 (1974). Indeed, even if the American Rule for the award of attorney's fees does apply to § 301 actions, it would appear that the "without justification" standard which has been fashioned by the courts of appeals fits within the "bad faith" exception or "willful disobedience of a court order" exception to the American Rule.

In any event, it does not appear that this issue is ripe for consideration by this Court, since the Eleventh Circuit held only that attorney's fees *might* be awardable in this case. There has been no final determination either by the Eleventh Circuit or by the District Court as to

whether the Company is entitled to an award of attorney's fees under the circumstances of this case. Therefore, it would be premature to grant a writ of certiorari on this issue, inasmuch as this issue has not been fully litigated or finally decided in the courts below.

CONCLUSION

For the reasons stated above, the Union's petition for a writ of certiorari should be denied.

Respectfully submitted,

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